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Supreme Court, U.S.
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No. 94-2091

In The

Supreme Court of the United States

October Term, 1994

R.A. BARTON; J.R. BARTON, JR. and BLAKE BARTON,

Petitioners,

vs.

AMERICAN RED CROSS and EOLINE McGOWAN, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the grant of summary judgment in favor of the Red Cross and Dr. McGowan based upon application of Alabama law.

2. Whether the court of appeals erred in affirming the district court's decision allowing more than three months for petitioners to conduct donor discovery.

3. Whether, despite the existence of adequate and independent grounds under Alabama law for the court of appeals' decision affirming summary judgment, this Court should render an opinion as to the scope of the Red Cross' immunity from punitive damages and trial by jury (rather than bench trial) where such opinion would not change the final judgment in this case.

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Respondents, the American Red Cross and Dr. Eoline McGowan, respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR DENYING THE WRIT

No constitutional principal or important issue of federal law is implicated in this case. As petitioners concede, (Petitioners' Brief at 10-15), this action is governed by Alabama law. The summary judgment decision in favor of the Red Cross and Dr. McGowan is not based or dependent upon federal law. Likewise, the lower courts' decisions with regard to the amount of time permitted to conduct donor discovery raise no important issue of federal law; such decisions are committed to the sound discretion of the district court. While the scope of the Red Cross' immunity from punitive damages and trial by jury (rather than bench trial) is arguably an important federal question, the presence of adequate and independent state law grounds for affirming summary judgment makes review by this Court inappropriate. The same judgment would still be required under Alabama law regardless of this Court's ruling on the immunity issues.

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE RED CROSS AND DR. MCGOWAN BASED UPON A PROPER APPLICATION OF ALABAMA LAW.

This case is a straightforward tort action governed by Alabama law and arising from petitioner R. A. Barton's infection with HIV as a result of a blood transfusion administered in July 1988. It was litigated in federal court solely because the Red

Cross is entitled to a federal forum. *See* 36 U.S.C. § 2; *see also American National Red Cross v. S.G.*, 112 S. Ct. 2465 (1992).

It is undisputed that the Red Cross tested the blood transfused to R. A. Barton for the presence of antibodies to HIV, the virus that causes AIDS, using the state-of-the-art ELISA test and that the results of that test were negative. (Petitioners' Brief at 9). It is also undisputed that no test for HIV is one hundred percent effective and that screening tests cannot detect HIV antibodies until several days (or weeks) after infection. (*Id.*). It is against this factual background that petitioners' claims that the Red Cross' blood testing, donor screening, and lookback notification practices were negligent must be assessed.

In a comprehensive opinion, the district court carefully considered and squarely rejected each of petitioners' claims, and the Eleventh Circuit Court of Appeals affirmed on all grounds. Specifically, the district court held that petitioners' donor screening, blood testing, and lookback notification claims were governed by the Alabama Medical Liability Act ("AMLA"), Ala. Code §§ 6-5-540, *et seq.*, as interpreted by the Alabama Supreme Court. (App. 6a, 26a). *See also Wilson v. American Red Cross*, 600 So. 2d 216 (Ala. 1992). Applying the AMLA, the district court held that the Red Cross and Dr. McGowan were entitled to summary judgment on these claims for two independent reasons: 1) that petitioners' expert, Dr. Irving Schwartz, was not properly qualified as a "similarly situated health care provider," as required by Ala. Code § 6-5-548(a), to offer the opinion that the Red Cross failed to exercise due care (App. 16a); and 2) that, even if Dr. Schwartz had been qualified, his testimony failed to raise a disputed issue of material fact as to whether the Red Cross complied with the appropriate standard of care because he failed to opine that the Red Cross engaged in *any* negligent act. (App. 17a-24a).

Nowhere do petitioners explain why the lower courts' decisions on these state law questions warrant review by this Court. Instead, petitioners baldly argue that, notwithstanding the failure of their own expert even to opine that the Red Cross was negligent, Alabama law requires a different result. Moreover, petitioners' discussion of Alabama law is defective. It conspicuously omits the most relevant authority in this area — the Alabama Supreme Court's holding in *Wilson v. American Red Cross*, 600 So. 2d 215 (Ala. 1992) that claims against the Red Cross for transfusion-related infections are governed by the AMLA. Both the district court and the Eleventh Circuit — experts in Alabama law — rejected precisely the arguments now advanced by petitioners, and there is no reason for this Court to expend scarce judicial resources to second-guess the lower courts on these matters of Alabama law.[1] *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) (individual courts of appeal are "in a better position than we are to recognize any special nuances of state law").

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DECISION ALLOWING PETITIONERS MORE THAN THREE MONTHS TO CONDUCT DONOR DISCOVERY.

Petitioners assert that the lower courts are "sharply divided upon the question of discovery from a blood donor in cases such as this." (Petitioners' Brief at 21). However, the propriety of

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1. Petitioners' claims that the Red Cross fraudulently suppressed information that the blood donor in this case was HIV positive and that this constituted outrageous conduct under Alabama law (Question Presented 4) are similarly meritless. Applying Alabama law, the district court below rejected these claims on the grounds that there was no evidence that the Red Cross' conduct was unreasonable, much less that it was intentional or sufficiently reckless to constitute the tort of outrage under Alabama law. (App. 25a-35a).

donor discovery is not the question before this Court, because here the district court *allowed* donor discovery. The only question presented is whether the district court permitted sufficient time for such discovery.

Matters such as the timing for the completion of discovery are committed to the sound discretion of the district court, and "[d]iscovery rulings will not be disturbed unless the district court has abused its discretion and such abuse has resulted in substantial harm to the party seeking relief." *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1477 (11th Cir. 1991). As the Eleventh Circuit found, there was no abuse of discretion here and certainly no prejudice to the petitioners. The district court made every effort to accommodate the petitioners, permitting donor discovery to go forward even after it had granted the Red Cross' motion for summary judgment. Petitioners' complaint that the district court should have granted additional extensions of the donor discovery deadline beyond those it did permit must be rejected, especially considering the petitioners' own admission that "efforts to locate the donor produced no results." (Petitioners' Brief at 22).[2] Petitioners' speculation that further efforts might have been more successful provides no basis for discretionary review in this Court.

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2. Donor discovery typically is designed to determine if a male donor was homosexual and might have been eliminated by different screening questions regarding his sexual activities. Because the donor here was a female, it is highly unlikely that donor discovery would have helped the petitioners in any event.

III.

BECAUSE ALABAMA LAW PROVIDES ADEQUATE AND INDEPENDENT BASES FOR SUMMARY JUDGMENT, NO DECISION REGARDING THE SCOPE OF THE RED CROSS' IMMUNITY FROM PUNITIVE DAMAGES OR TRIAL BY JURY IS APPROPRIATE AT THIS TIME.

As noted above, Alabama tort law governs whether the district court's grant of summary judgment in favor of the Red Cross and Dr. McGowan was appropriate in this case. No decision regarding the scope of the Red Cross' immunity from punitive damages or trial by jury (rather than a bench trial) will change this. Because the same summary judgment would still be required under Alabama law even if the Court were inclined to reverse the lower courts' decisions regarding the Red Cross' immunity, this Court's "review could amount to nothing more than an advisory opinion." *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (*quoting Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). Thus, although interpretation of the scope of immunity conferred by the Red Cross' charter may present a federal question worthy of this Court's review at some point, that question is not properly before the Court at this time.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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